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No. 59534-2-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

BETH AND DOUG O'NEILL,

Appellant,

v.

CITY OF SHORELINE AND DEPUTY MAYOR MAGGIE FIMIA,

Respondent.

BRIEF OF RESPONDENT FIMIA

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I. INTRODUCTION

This opposition brief is filed on behalf of City of Shoreline Deputy Mayor Maggie Fimia to address issues unique to her position. Deputy Mayor Fimia also incorporates the City of Shoreline's opposition brief.

The purpose of the Public Records Act is to "promote the scrutiny of government" – it is not designed "to promote the scrutiny of particular individuals." *Tiberino v. Spokane County*, 103 Wn. App. 680, 689, 13 P.3d 1104 (2000). Public servants, whether employees or elected officials, retain the right to privacy, along with their First Amendment rights. The Public Records Act cannot be used to invade those rights simply to satisfy the curiosity of the public.

Here, political opponents of Deputy Mayor Fimia are mad because someone forwarded an email critical of the Shoreline City Council and local Democratic Party to an ally of Deputy Mayor Fimia. Deputy Mayor Fimia came into possession of this email in her personal, political capacity. It was not provided to facilitate any government function. It was not sent to a city computer and the electronic form of the email was never used by the City. Thus the electronic version of the email never became a "public record" as defined by the Public Records Act.

Deputy Mayor Fimia did choose to print a paper copy of this email and read that print-out at a City Council meeting. This arguably turned

that print-out into a public record. Respondent Beth O'Neill made a request for that email and has received a copy of that print-out.

Ms. O'Neill was not satisfied, however, so she sued the City of Shoreline and Deputy Mayor Fimia. Ms. O'Neill is demanding the metadata from the electronic version of this email on Deputy Mayor Fimia's personal computer so she can figure out who forwarded the email to Deputy Mayor Fimia's political ally, and who else received this forwarded email. The contents of Deputy Mayor Fimia's personal computer are not per se public records. The electronic copy of the email was not sent to Deputy Mayor Fimia as part of her official city function, but instead was sent for political reasons. Thus, it is not a public record, any more than any other email sent to Deputy Mayor Fimia by a political supporter for political purposes. Moreover, Deputy Mayor Fimia has a First Amendment right to anonymously associate with others, and that would exempt the email from disclosure, even if it were a public record.

Thus, for these grounds and the grounds identified in the City of Shoreline's opposition brief, Deputy Mayor Fimia asks the Court to affirm the trial court.

II. RESTATEMENT OF THE ISSUES

The email in question is a criticism of the City of Shoreline by a private citizen sent to other private citizens, eventually forwarded by

another private citizen to a City of Shoreline elected official. As a political critique sent privately, it does not relate to the "conduct" of government or the performance of any government or proprietary function. The electronic version of the email was never used by government or possessed by the government. Is it a public record? (Relating to Assignments of Error 3 and 4.)

Deputy Mayor Fimia has a First Amendment right to anonymously associate with whoever forwarded this email and whoever else received it. If the electronic version contained metadata revealing those identities, would it be exempt from disclosure based on the First Amendment? (Relating to Assignments of Error 3 and 4.)

III. STATEMENT OF THE CASE

This case centers around an email from Diane Hettrick, sent at the request of Beth O'Neill, criticizing the local democratic party for being involved in a City of Shoreline zoning dispute. O'Neill Dec. ex. J-p.24. It is not clear to whom the Hettrick/O'Neill email was originally sent, but it was not sent to anyone at the City of Shoreline, and thus was not meant to be used by the City to affect any City function. Someone who received the email, however, forwarded a copy to Lisa Thwing, the chair of the local Republican Party. O'Neill Dec. ex. J-p.23. Ms. Thwing received the email because of the accusations against the Democratic Party, out of a

concern from both parties that they not get mired in the "toxic" political environment the Hettrick/O'Neill email helped foster. O'Neill Dec. ex. J-p.23.

Ms. Thwing forwarded the Hettrick/O'Neill email to an undisclosed number of people, blind carbon copying those recipients. Deputy Mayor Fimia was one of the recipients.

As described more fully in the City's brief, after Deputy Mayor Fimia printed a copy of the email and read that copy, Ms. O'Neill requested a copy of the Hettrick/O'Neill email. After a series of requests – including requests for information[1] as well as public records requests, Ms. O'Neill eventually asked for metadata about the Thwing email but never asked the City for an electronic version of the email. See O'Neill Dec. Exs. D, F, G, I. By the time Ms. O'Neill requested the metadata, the electronic version of the email had been deleted, but the City was still able to reproduce the metadata when Ms. Thwing re-forwarded the email, which it provided to Ms. O'Neill. O'Neill Dec. ex. L.

[1] For example, in her second written request on September 20, Ms. O'Neill asked for "information relating to this email: how it was received, by Maggie Fimia, from whom it was received, and the forwarding chain." O'Neill Dec. ex. F. "An important distinction must be drawn between a request for information about public records and a request for the records themselves. The act does not require agencies to research or explain public records .... Nor does the act require public agencies to be mind readers." *Bonamy v. City of Seattle*, 92 Wn. App. 403, 450-51, 960 P.2d 447 (1998).

IV. ARGUMENT

A. In This Case, The Electronic Version Of The Email Sought Is Not A Public Record.

The first step in analyzing whether an agency failed to comply with the Public Records Act is to determine if the record at issue is a "public record." To be a public record, a document must be (1) a writing; (2) containing information relating to the conduct of government or performance of any government function or proprietary function; and (3) prepared, owned, used or retained by any state or local agency. *Tiberino v. Spokane County*, 103 Wn. App. 680, 687 (2000).

The fact that an email mentions or criticizes government does not mean it's automatically a public record. In determining whether a record contains "information relating to the conduct of government or performance of any government function or proprietary function" the Court must look to "the role the document plays in the system." *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 711-12, 780 P.2d 272 (1989). For this analysis, the Court should look at factors such as whether the agency controls the document and whether the document was generated within the agency. *Yacobellis*, 55 Wn. App. at 712.

Personal notes, calendars and emails controlled by public servants are not per se public records. The contents may be unrelated to the function of government. *See Tibernaro*, 103 Wn. App. at 691 (holding content of personal emails not subject to disclosure because "the content of Ms. Tibernino's e-mails is personal and is unrelated to government

operations"). Or they may be created or maintained for a private purpose not intended for distribution or circulation within the agency. *Yacobellis*, 55 Wn. App. at 712 (noting personal calendars and phone messages were not public records subject to disclosure); *see also Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995 (1993) (holding verification-request information for applicants "relate neither to the conduct of government nor the performance of any government function").

Here, the electronic version of the email in question is not a public record. It was created by a private citizen for the purposes of criticizing the City of Shoreline City Council. It was not sent to the City or meant to help with any City function. It was not generated by the City or within the City's control. Its only relation to the City was that someone forwarded a copy for political reasons to a member of the City Council.[2] That fact alone does not make it a public record.

When Deputy Mayor Fimia chose to print a copy of the email and read it at a City Council meeting, then arguably the piece of paper itself was used by Deputy Mayor Fimia to affect the function of government. And thus that paper copy may have become a public record.

But the original electronic version of the email was not so used and did not become a public record.[3] Thus, the metadata, that is only part of

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[2] In this way, the email is no different that an email with a campaign supporter about a political promise during a re-election campaign. The promise may be about something the official wants to do in office, but that does not make it a public record.

[3] As argued by the City, the City was not even required to retain the electronic version once a print-out existed.

the electronic version, also did not become a public record. Accordingly, the City did not violate the Public Records Act in this case.

B. The First Amendment Right To Association Protects Certain Documents From Discovery.

The First Amendment protects the right of association.[4] The right to privately and anonymously associate is an indispensable part of this right to associate. *Eugster v. City of Spokane*, 121 Wn. App. 799, 807, 91 P.3d 117 (2004). A three-part test applies when to determine whether the information sought is exempt from disclosure pursuant to the First Amendment grounds. *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 105 Wn. App. 813, 822, 21 P.3d 1157 (2001), *aff'd on other grounds*, 146 Wn.2d 370, 46 P.3d 789 (2002); *accord, Snendigar v. Hoddersen*, 114 Wn.2d 153, 164, 786 P.2d 781 (1990); *Eugster*, 121 Wn. App. at 807.[5]

First, the party raising the privilege has a low burden – it "need only show some probability that the requested disclosure will infringe upon its First Amendment rights." *Right-Price*, 105 Wn. App. at 822. Second, the burden then shifts to the requesting party to show the materiality and relevance of the information, and that it cannot be obtained from other sources. *Right-Price*, 105 Wn. App. at 822. Third, if the

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[4] Constitutional arguments may be raised for the first time on appeal. RAP 2.5. Moreover, "an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court." *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) (applying rule in public records case).

[5] Although these cases involve discovery, not a public records request, the protections of the First Amendment are equally applicable in the public records context.

requesting party meets this burden, the Court must then weigh the First Amendment right to the relevance. *Right-Price*, 105 Wn. App. at 822.

When a request is for certain information, such as members' lists or meeting minutes, courts will assume the requests infringe on the right to association. *Eugster*, 121 Wn. App. at 808. Courts will also find infringement when the resisting party presented past evidence that suggests allowing the record could lead to a chilling effect on associational interests. *Right-Price*, 105 Wn. App. at 824.

Once the burden shifts to the requester, the requester cannot show relevance and materiality simply by arguing the requested information "is likely to lead to information to substantiate its claims." *Right-Price*, 105 Wn. App. at 825. "[S]peculation that somewhere in the mass of information sought, [the requester] may find support for its theories" is insufficient to meet this burden. *Right-Price*, 105 Wn. App. at 825-26. Instead, what is required is a "description of the information sought and its importance with a reasonable degree of specificity." *Eugster*, 121 Wn. App. at 810. The requester must also "make a reasonably explicit showing that every reasonable alternative source of information has been exhausted. *Eugster*, 121 Wn. App. at 810 (quotation marks omitted).

1. There is some probability that the information sought would infringe on Deputy Mayor Fimia's right to association.

Ms. O'Neill is trying to figure out who leaked the Hettrick/O'Neill email to Ms. Thwing and who else is sympathetic to those who oppose Ms. O'Neill's position. These sympathetic persons included Deputy

Mayor Fimia, and Deputy Mayor Fimia has a First Amendment right to privately and anonymously associate with those who share her point of view. O'Neill wants the metadata to determine who else received the forwarded email and who forwarded it in the first case. See O'Neill Dec. ex. F.[6] If the Public Records Act required Deputy Mayor Fimia to disclose her fellow sympathizers, this would infringe on her First Amendment right.

The original email from Diane Hettrick was clearly intended to go to supporters of hers and Ms. O'Neill's. One of the recipients was not a true supporter and forwarded the email to Lisa Thwing because the email attacked an entire political party. O'Neill Dec., ex. J-23 (Thwing email explaining political nature of dispute). Ms. Thwing then forwarded the message to others who would oppose the Hettrick/O'Neill position, including Deputy Mayor Fimia. O'Neill Dec., ex. J-23

If Deputy Mayor Fimia were forced to disclose who sent the email to Ms. Thwing and who else Ms. Thwing sent the email to, this might discourage others from anonymously associating with Ms. Thwing and Deputy Mayor Fimia for fear of being attacked by Ms. O'Neill. Whoever forwarded the email to Ms. Thwing has a right to disagree with the Hettrick/O'Neill position and anonymously associate with others who

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[6] As demonstrated by the City, who produced the metadata when the email was re-forwarded to Deputy Mayor Fimia, the metadata does not contain this additional information, and Ms. O'Neill has already received all the metadata. O'Neill Dec. ex. L. The Public Records Act does not require – or even allow – original records to be produced, so by providing the identical metadata from the re-forwarded email, the City has fully complied with the request.

disagree, such as Deputy Mayor Fimia and Ms. Thwing. Ms. Thwing and Deputy Mayor Fimia have a right to anonymously associate with whoever else Ms. Thwing forwarded the Hettrick/O'Neill email. If Deputy Mayor Fimia were forced to disclose these identities, it would chill her right to anonymously associate with those who oppose the Hettrick/O'Neill position.

Thus, the burden is on Ms. O'Neill to show the need for the information.

2. Because this is a records case, there is no "need" for the information sought.

Under this prong of the First Amendment analysis in a discovery case, the Court would look at how the information sought would support the requesting party's case. But in a records request suit, there is no "need" for the document because there is no underlying dispute. *Soter v. Cowles Publ'ing Co.*, 131 Wn. App. 882, 899-901, 130 P.3d 840 (2006), *review accepted* 158 Wash.2d 1029 (2007). Thus, Ms. O'Neill cannot make a showing of need to overcome the infringement on Deputy Mayor Fimia's First Amendment rights.

Thus balancing the infringement and lack of need, the Court should rule the information sought in the metadata, even if it existed and was a public record, would be exempt pursuant to the First Amendment.

C. Plaintiffs Are Not Entitled To Attorney Fees.

There are four reasons why this Court should not award attorney fees.

First, for the reasons identified in the City's brief, the City did not withhold any records improperly.

Second, the trial court's ruling should be upheld because the metadata at issue was not a public record and the information sought is protected by the First Amendment.

Third, even if this Court were to remand, the requester would not be entitled to fees until and unless the trial court ultimately ruled the City improperly withheld a record.

Fourth, under no circumstances would Deputy Mayor Fimia be liable for fees. As an individual, Deputy Mayor Fimia is not a proper defendant in this suit. *See* RCW 42.56.550(1) (noting an "agency" may be sued). Because Deputy Mayor Fimia is named in the document at issue, she has standing to object to its disclosure. *See* RCW 42.56.540. But under that statute, Ms. Fimia cannot be held liable for fees. *See Bellevue John Does v. Bellevue Sch. Dist.*, 129 Wn. App. 832, 864-66, 120 P.3d 616 (2005) (holding no fees would be awarded under former RCW 42.17.330, recodified at RCW 42.56.540), *review accepted*, 158 Wash.2d 1024.

V. CONCLUSION

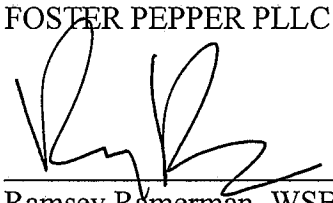
Ms. O'Neill is disappointed because she wanted to learn who forwarded the Hettrick/O'Neill email to Ms. Thwing and who else Ms. Thwing thought was unsympathetic to those who opposed Ms. O'Neill's position. But the Hettrick/O'Neill email is a political criticism forwarded

to Deputy Mayor Fimia for political reasons. Under these circumstances, it does not relate to the function of government and does not qualify as a public record. Moreover, Deputy Mayor Fimia and those who forwarded and received the email have a First Amendment associational right to remain anonymous. Thus, Ms. O'Neill has no right under the Public Records Act to the information see seeks.

Accordingly, based on the forgoing reasons and the reasons stated in the City of Shoreline's opposition brief, this Court should affirm the trial court.

RESPECTFULLY SUBMITTED this 12th day of October, 2007.

FOSTER PEPPER PLLC



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CERTIFICATE OF SERVICE

I, Terri Quale, certify under penalty of perjury that true and correct copies of the above attached document were delivered as follows:

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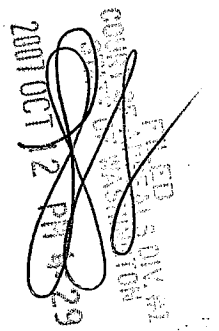

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